

The emergence of the “Delta” COVID-19 variant seems to have us going backwards real fast. Just before Governor Andrew Cuomo’s political life imploded, he held a press conference at which he announced that patient-facing healthcare workers at state hospitals will be required to take the COVID-19 vaccine and that other state government employees will be required to show proof of vaccination or be tested weekly. This set off quite a stir. Other local governments quickly followed suit. Most also required that all employees—even the vaccinated—resume wearing masks at work. Testing and masks, which were the rage at the beginning of the pandemic, seems to have come back in a hurry.

EEOC allows for mandatory vaccination and testing

In some respects, Governor Cuomo’s decision on mandatory vaccines for some workers is not earth shattering as the Equal Employment Opportunity Commission (“EEOC”) had no objection to an employer’s mandatory vaccine policy provided that employers allow for exemptions for those employees who have a medical condition or sincerely held religious belief precluding vaccination. So, a true mandatory vaccination policy—where 100% of the work force has to get the shot except as exempted—would be in accord with current EEOC guidance. The Department of Defense is reportedly requiring all service members be vaccinated. While not a required showing, there is certainly a compelling rational basis for requiring other employees, like hospital workers who come into contact with the public, to get vaccinated. However, this is less of an imperative when most of the work force is working remotely.

Despite the right of an employer to force its workers to get vaccinated or risk being fired, most private and public sector employers have and will likely continue to only “encourage” vaccination – with or without incentives. The big change will be that many employers may now follow the lead of the state and local governments and require all non-vaccinated employees to submit to a COVID-19 test or provide proof of a negative test to work on-site. This is lawful as the EEOC allows employers to require that employees submit to a COVID-19 test prior to entering the work site.

Some employers are implementing a more rigid policy which limits on-site access to only those employees who are vaccinated and denying access to the non-vaccinated. New York City is taking a similar approach by requiring that certain public venues limit access only to the vaccinated. Only a few employers have fired employees who refuse to get vaccinated. While these hard-core policies may make sense in the abstract and certainly serve as an “incentive” to get vaccinated, beware of the medical condition and sincerely held religious belief exemptions.

Collecting proof of vaccination and testing

Many New York employers have been asking for proof of vaccination for a few weeks now so as to allow employees to work on-site without masking or social distancing. While collecting proof of vaccine seems easy enough, there are some pitfalls. The EEOC allows for the inquiry into an employee’s vaccination status and the collection of such proof. However, an employer may not ask the employee the reason why the employee is not vaccinated, as this question may elicit protected information on one’s disability (in violation of the American with Disabilities Act) or genetic information in violation of the Genetic Information Nondiscrimination Act. Proof of COVID-19 vaccine and testing documents should be treated like confidential medical information and kept in a separate and secure file which is not part of the employee’s personnel file. Also, as with incentives to get vaccinated, employers should not have a testing protocol which is so onerous as to be deemed unduly coercive and which forces a person to get vaccinated against their will.

Masking for all

The current Centers for Disease Control and Prevention (“CDC”) guidance is to recommend that all individuals—vaccinated or not—wear masks while indoors if the region is in an “area of substantial or high transmission.” Recall that all unvaccinated employees were and still are required to wear masks at work in common areas, while transiting corridors and if they work within six feet of another employee. Now, all employees will follow this protocol. To explain the new mandate, the CDC explains that, while the vaccine is effective against the virus, a vaccinated person can still be a carrier of the mutated virus and pass it along to the unvaccinated. Expect that this masking protocol will remain in effect for some time, longer if new easily transmissible virus mutations emerge.

Practical problems

Testing capacity. As most employers may recall, the lack of access to rapid COVID-19 testing and the delay in results made employee testing problematic at the beginning of the pandemic. As a result, most employers were forced to default using an employee’s daily self-report affirming no virus symptoms or possible exposures – a less than scientific screening protocol. While requiring testing-before-work or submission of proof of a negative test seems to be a solution, it remains

hard to imagine that there are enough accredited testing sites to test all non-vaccinated employees given this expected surge in demand.

Employee unrest. Some unions, especially public sector unions, are beginning to push back on the mandatory vaccine policy and the vaccine-or-test policies. They are demanding to bargain over such policies, claiming that these policies implicate a term and condition of employment. In addition, non-organized employees who have a much better job market may jump ship to work for an employer who is not pushing rigid policies or permit remote work.

Fraud. As with any printed document, expect that some employees will fabricate vaccination cards and proof of testing. To counter the forged card prospect, the New York State "Excelsior Pass Wallet," which appears on an employee's cell phone, is digital vaccination proof. Similarly, beware that some employees will bring in a suspect test result. Many employers may not want to over-police this issue and will take reasonable steps to verify the proof submitted.

Compensation. Understand that an employer directive to an employee that he or she be tested on-site (or off site) prior to being allowed into work may trigger a duty to pay the employee under the Fair Labor Standards Act or New York Labor Law. On the other hand, simply requiring that the same employee show proof of vaccination or a negative test upon arrival at work may not. Some employees are considering the proof of vaccination or a negative test a condition of employment, like having a commercial driver's license ("CDL") for a truck driver. If you do not have the proof, you do not work and are sent home without pay. Of course, an organized work force and its union may push back on that approach and demand to bargain, grieve the loss of pay, etc...

Take Always

Stayed tuned, especially as "the science" surrounding COVID and its variants keeps changing. Instead of just encouraging vaccinations, employers should also consider requiring proof of vaccination or a negative test from unvaccinated employees. If it can be justified, consider making a vaccination a "condition of employment," like having a CDL. In addition, employers should ensure that all employees---vaccinated or not---are masked, especially if the employer is located in an "area of substantial or high transmission." Consult with C&G employment counsel on how to craft an enforceable and defensible vaccination and testing policy.

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